

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEVIN P. SMITH,

Claimant,

v.

LANCE MCCORD, dba MCCORD
CONSTRUCTION, Employer,

and

GEM STATE STAFFING, Employer,
and STATE INSURANCE FUND, Surety,

and

LARRY HOBBS, dba HOBBS
CONSTRUCTION, Employer,

Defendants.

IC 2005-007116

2005-008057

2005-008154

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed: December 28, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Idaho Falls, Idaho, on December 12, 2006. Dennis R. Petersen of Idaho Falls represented Claimant. John O. Avery of Idaho Falls represented Defendant Lance McCord, dba McCord Construction (McCord). Alan K. Hull of Boise represented Defendants Gem State Staffing (Gem State) and State Insurance Fund (SIF). James D. Holman of Idaho Falls represented Defendant Larry Hobbs, dba Hobbs Construction (Hobbs). The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. McCord did not file a post-

hearing brief. Claimant filed an opening brief but opted not to file a reply brief. The matter came under advisement on September 14, 2007, and is now ready for decision.

ISSUES

As modified and agreed upon by the parties at hearing, the issues to be decided were:

1. At the time of the accident, who had the obligation to provide workers' compensation coverage for Claimant?
2. Whether Hobbs is a statutory employer;
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. medical care; and
 - b. attorney fees.

Claimant withdrew the issue of attorney fees in his post-hearing brief.

Hobbs asserts that the Commission must also decide issues of estoppel and subrogation. Neither issue was identified by the Commission in its Amended Notice of Hearing dated November 16, 2006. The estoppel issue was raised by Hobbs at hearing and received objection from Gem State. Issues of estoppel and quasi-estoppel asserted with regard to Gem State and Claimant are beyond the jurisdiction of the Commission. However, the issue of whether or not SIF is estopped to deny coverage for Claimant pursuant to Idaho Code § 72-229 is subsumed in the issue of who has the obligation to provide workers' compensation coverage for Claimant and will be addressed in this decision. The issue of subrogation pursuant to Idaho Code § 72-216 is within the jurisdiction of the Commission. However, the issue was not timely asserted and was articulated for the first time in Hobbs' post-hearing brief. Except as to estoppel pursuant to Idaho Code § 72-229, Hobbs' request to add issues is denied. This denial should not be

construed as an opinion on the merits of the additional issues or as a limitation of remedies to which Hobbs may otherwise be entitled.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an injury to his left knee while in the course of his employment on June 8, 2005. The primary issue in dispute is the identity of the employer who had the obligation to provide workers' compensation coverage for Claimant. This case involves a sub-contractor (McCord), a staffing agency (Gem State), and a general contractor (Hobbs).

Claimant contends that he was an employee of Gem State at the time of his injury and that he is entitled to benefits from Gem State's surety, SIF. In the alternative, Claimant asserts that he was an employee of McCord and that Hobbs was the statutory employer pursuant to Idaho Code § 72-216. Claimant seeks medical benefits, including a knee brace and/or arthroscopic surgery.

McCord contends that he entered into a contract with Gem State for payroll services in which Gem State assumed responsibility for providing McCord's employees with workers' compensation coverage. McCord asserts that the contractual relationship was in existence on the date of injury and that SIF is liable for Claimant's medical care.

Gem State contends that its contract with McCord was cancelled no later than June 7, 2005, and that Claimant was not a Gem State employee on the date of the industrial injury. Specifically, Gem State asserts that its contract with McCord was orally cancelled on either June 6 or June 7, 2005. Gem State maintains that McCord was in breach of the contract for multiple reasons, including providing two payroll checks to Gem State that were returned for insufficient funds.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 3

Hobbs contends that he required all sub-contactors on the job, including McCord, to provide workers' compensation insurance for their own employees. Hobbs asserts that he reasonably relied on a certificate of insurance showing McCord as a certificate holder and that Claimant's workers' compensation claim should be covered by SIF.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1-22, admitted at hearing;
2. Gem State's Exhibits¹ 1-16, admitted at hearing;
3. Witness testimony at hearing of Kevin P. Smith, Nicholas (Nick) A. Burggraf, Pam Malone,² Stan E. Visser, Larry Hobbs, and Lance McCord;
4. The post-hearing deposition of Linda Stewart, taken June 14, 2007; and
5. The Idaho Industrial Commission legal file.

Gem State's objection at page 22 of Linda Stewart's deposition is sustained. All other objections are overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

THE PARTIES

1. Claimant was born on June 6, 1963, and was 43 at the time of hearing. His previous employment has been in the construction industry as a framer. Claimant did not have pre-existing left knee problems. Claimant worked intermittently for McCord over a period of

¹ McCord and Hobbs joined in offering Gem State's exhibits and these will be referred to as Defendants' Exhibits.

² Pam Malone was formerly known as Pam Salois and both names appear in the record.

several years through August of 2005. Claimant was working for McCord prior to starting the Bank of Commerce remodel project in Idaho Falls (the project) in April 2005.

2. McCord is a builder who specializes in framing and became an incorporated business in late 2003. Throughout the period in question, McCord was Claimant's immediate supervisor and directed the details of his work. McCord employed one other framer and approximately five laborers who worked on the project. McCord initiated a relationship with Gem State in March of 2005 so that he could focus on the actual framing business and Gem State could handle payroll, taxes, and workers' compensation. McCord previously maintained his own policy of workers' compensation but has not done so since early 2005.

3. Gem State is a staffing agency that offers multiple services including temporary staffing, long-term staffing, and temp-to-hire assignments. A relatively small portion of its business is to provide payroll services to assigned workers of client companies. Payroll services include withholding taxes, issuing checks and providing workers' compensation coverage. Stan Visser is the vice president of Gem State and is responsible for field operations of multiple stores. Nick Burggraf is the manager of the Idaho Falls location. Gem State has a policy of workers' compensation insurance to cover its employees and assigned workers of client companies.

4. Hobbs is a building contractor specializing in design and construction of custom homes and light commercial properties. He was the general contractor on the project. Hobbs hired McCord as a framing sub-contractor. Hobbs has not carried workers' compensation insurance since 2003. He chose to drop coverage at that time because he did not have any employees working directly for him. Hobbs advised all sub-contractors working on the project

that they would need to maintain workers' compensation insurance for their own employees and provide documentation showing coverage.

5. SIF is the workers' compensation surety for Gem State. SIF has continuously insured Gem State from late 2000 through at least the time of hearing. Coincidentally, SIF was the workers' compensation surety for McCord in 2005 and Hobbs in 2003, before the lapse of those policies. Pam Malone works for SIF as an underwriter and serviced the Gem State account. Linda Stewart works for SIF as an assistant fund manager and supervises the underwriting department.

THE INJURY

6. On June 8, 2005, Claimant was working at the project site when his right foot went through a sheetrock ceiling, resulting in his left knee bending sideways. The injury was reported to McCord on the day it occurred and Claimant sought treatment the following day at an urgent care clinic. Claimant subsequently sought treatment with Casey Huntsman, M.D., who diagnosed a left medial collateral ligament (MCL) sprain and a possible medial meniscus tear. A left knee MRI performed on July 9, 2005, confirmed a sprain or small tear of the MCL but did not identify a medial meniscal tear. Claimant completed a three-month course of conservative treatment without improvement and Dr. Huntsman suspected a partial medial meniscus tear that was not picked up on the MRI. Dr. Huntsman recommended left knee diagnostic arthroscopy and prescribed a functional knee brace. Claimant has not received medical treatment since September 2005 due to an inability to pay and denial of his claim by Defendants. Claimant testified that his left knee hurts every day and has not significantly improved since the injury.

MCCORD'S RELATIONSHIP WITH GEM STATE

7. McCord contacted Gem State by phone in March 2005 to inquire about services. McCord's wife³ met with Nick Burggraf from Gem State and a quote for services was generated. She relayed the information to McCord and an agreement was reached.

8. Gem State's Quote for Payroll Services (quote) to McCord is a one-page document signed by Nick Burggraf on March 16, 2005, and by McCord on March 18, 2005. There is no other contract for services between the two parties and the quote is also referred to as a contract. The quote states that the pay rate for a skilled framer is \$12 per hour with a billing rate of \$17.56 per hour. The pay rate is the hourly wage to be paid to the employee. The billing rate includes the pay rate plus Gem State's administrative fee, workers' compensation insurance, all applicable employer state and federal taxes, unemployment taxes, and liability insurance. The quote states that Gem State's insurance carrier will provide a Certificate of Insurance Liability. Obligations imposed on McCord are to "simply turn in your hours for the pay period to our office" and "payment is due prior to payroll checks being issued each pay period." Defendants' Ex. 8, p. 1.

9. McCord identified himself, Claimant, and Brad Anderson, the other framer, as employees for whom payroll services were requested from Gem State. McCord did not identify the laborers working for him on the project to Gem State, and those employees were not issued checks or provided other payroll services through Gem State (nor, evidently, were the laborers ever covered under any workers' compensation policy). Stan Visser testified that Gem State acted as a professional employer operation (PEO) for the three individuals identified by McCord.

³ Lee Ann Craig McCord is Lance McCord's ex-wife. Although they divorced approximately three years ago, she is consistently referred to as McCord's wife.

10. McCord's pay period was every two weeks, beginning on a Thursday and ending on a Wednesday. Pay day for McCord's employees was the Friday immediately following the two week cycle. Gem State first issued payroll checks for McCord on April 1, 2005, at which time Claimant was paid for 30 hours of work for the pay period ending on March 30, 2005.

11. The check written by McCord and payable to Gem State for the April 1, 2005, payroll was returned by the bank for insufficient funds. McCord reimbursed Gem State, in cash, for the bounced check on or about April 4, 2005. Gem State required that McCord pay cash for the next two pay periods processed by Gem State.

12. McCord did not utilize Gem State's services for the payroll period ending on April 13, 2005. There is conflicting evidence regarding the reason that Gem State did not process McCord's payroll for that pay period. Claimant testified that he was sometimes paid in cash by McCord. McCord testified that he couldn't recall, but thought that there was little or no work due to the weather conditions.

13. McCord paid cash to Gem State for the payroll periods ending on April 27, 2005, and May 11, 2005. Claimant received pay checks from Gem State on April 29, 2005, and May 13, 2005.

14. Gem State accepted a check from McCord for the pay period ending May 25, 2005. Claimant received a paycheck from Gem State on May 27, 2005. On June 6, 2005, Stan Visser became aware that McCord's check had bounced. Mr. Visser contacted Nick Burggraf by phone and instructed him to go to the work site and meet with McCord to arrange for reimbursement for the bad check and to terminate the relationship between McCord and Gem State. Mr. Visser explained that a bounced check was grounds to terminate the relationship,

especially since this was the second occurrence and McCord had been given the benefit of the doubt on the first occurrence.

15. Nick Burggraf testified that he was contacted by Mr. Visser on June 6, 2005, or June 7, 2005 and notified of the second bounced check. Mr. Burggraf went to the job site on June 7, 2005, and told McCord that Gem State was no longer going to provide him with payroll services. Mr. Burggraf demanded reimbursement for the bad check and was paid in cash a few days later by McCord's wife. Burggraf further testified that there was no doubt in his mind that he made it clear to McCord that their relationship was terminated.

16. McCord denies that Mr. Burggraf came to the job site on June 7, 2005, and testified that he didn't know that there was a problem with his relationship with Gem State until June 24, 2005—the date he first learned that Gem State was not taking care of Claimant's injury. McCord testified that he went to the Gem State office later in the day on June 24, 2005, and spoke to Mr. Burggraf who provided him a copy of a letter dated June 21, 2005, addressed to McCord from SIF advising that verification of coverage was being withdrawn.

17. McCord did not utilize Gem State's services for the pay period from May 26, 2005, through June 8, 2005. McCord paid his employees, including Claimant, in cash on June 10, 2005. McCord initially testified that he attempted to drop off payroll with Gem State on June 10, 2005 and was turned away by Gem State. McCord's testimony is not credible—he subsequently testified that his dates were "all messed up" and reiterated that he did not know that Gem State considered their relationship to be over until June 24, 2005.

18. Mr. Burggraf considered Claimant to be an employee of Gem State from the date he signed an application on April 1, 2005, until June 7, 2005, when the contract with McCord was verbally terminated. There were no verbal agreements between McCord and Gem State that

supplement the quote for services regarding the effective start date of the relationship or the manner by which the relationship could be terminated.

CLAIMANT'S RELATIONSHIP WITH GEM STATE

19. On April 1, 2005, McCord took paperwork to the job site for Claimant to complete, including an Application for Employment for Gem State, an Employment Eligibility Verification (Form I-9), and an Employee's Withholding Allowance Certificate (Form W-4). Claimant understood that he was completing the forms for payroll purposes and continued to consider McCord to be his employer. Prior to June 21, 2005, Claimant did not speak to anyone from Gem State, other than Liza Ball, who signed Claimant's Form I-9 as Gem State's authorized representative.

20. The Application for Employment with Gem State includes a form paragraph and instructs the applicant to read and agree to the following:

I agree to conform to the rules and regulations of Gem State Staffing. I understand that I am a temporary employee, and work on a voluntary basis. I am required to contact Gem State Staffing and notify them that I am available to work daily whenever I choose. If I am on a short term, long term, or permanent placement assignment, I understand that I must contact Gem State Staffing when that assignment is completed. I understand that I must contact Gem State Staffing during lay offs while at an assignment. I must make myself available for work daily whenever I choose. I understand that Gem State Staffing or I may terminate my employment with Gem State Staffing at any time. I understand that I am prohibited from releasing to any other party any information whatsoever about Gem State Staffing, which is of a confidential nature or which could be deemed to constitute a "trade secret". I understand the duties, including physical requirements of the position for which I am applying with Gem State Staffing, and certify that I am capable of performing the required tasks with or without reasonable accommodation. If I cannot perform the required tasks of a job assigned, I will notify Gem State staffing *before* I am dispatched to the job. I understand that when I am on a job assignment that *I am an employee of Gem State Staffing*. At no time will I attempt to solicit extra pay or permanent employment from the customer that I am temporarily assigned to. I understand that this is grounds for immediate termination.

Defendants' Ex. 8, p. 2 (Emphasis in original). Claimant signed the application on April 1, 2005.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 10

21. Claimant never contacted Gem State for an assignment and was never assigned employment by Gem State. Claimant worked for McCord before, during, and after the relationship between McCord and Gem State.

22. Claimant's first paycheck from Gem State was issued on April 1, 2005, and reflected 30 hours of work performed from March 17, 2005, through March 30, 2005.

23. Claimant's final paycheck from Gem State was issued on May 27, 2005 and reflected 70.5 hours of work performed from May 12, 2005, through May 25, 2005.

24. Gem State did not have the right to control the details of Claimant's work and did not supervise Claimant in any manner.

25. Gem State did not notify Claimant that he had been terminated or that it had terminated its relationship with McCord prior to Claimant's inquiry about workers' compensation benefits on June 21, 2005.

26. Gem State was unaware of Claimant's industrial injury until Claimant reported the injury to Nick Burggraf on June 21, 2005.

GEM STATE'S RELATIONSHIP WITH SIF

27. SIF issued a policy of worker's compensation insurance to Gem State on November 23, 2000. The policy automatically renewed on October 1st of each year, starting October 1, 2001. The policy in effect at the time of Claimant's injury renewed on October 1, 2004 with a policy period of one year.

28. Gem State's workers' compensation policy was not cancelled by SIF, and did not lapse at any time during the period from November 23, 2000, through the date of Linda Stewart's deposition on June 14, 2007.

29. Gem State is the only named insured on the workers' compensation policy issued

by SIF.

30. Gem State pays a workers' compensation premium to SIF on a monthly basis. The premium amount fluctuates depending on the number of employees reported by Gem State and the corresponding occupation code assigned to each employee. Each occupation code has a specific premium amount that is calculated as an insurance cost per every \$100 in payroll. Gem State does not identify employees to SIF by name, only by job classification.

31. The workers' compensation premium paid by Gem State to SIF is calculated and paid retroactively, referred to as paying in arrears.

32. Gem State made premium payments for McCord's identified employees for periods during which payroll service was provided. Gem State did not make premium payments for McCord's employees during the weeks that McCord paid his employees in cash. No premium was paid by Gem State to SIF for McCord or his employees after the pay period ending May 25, 2005.

THE CERTIFICATE OF INSURANCE

33. SIF issues certificates of insurance when requested to do so by their insureds. A certificate holder is any person or entity to whom the insured requests a certificate be sent.

34. "Certificate holder" is not synonymous with "additional insured." The certificate holder does not become an insured upon the issuance of a certificate.

35. The Certificate of Insurance issued to McCord from SIF certified that a policy was issued by SIF to Gem State and that the policy was in full force and effect at the time the certificate was issued.

36. Cancellation of the Certificate of Insurance issued to McCord had no effect on the validity of the policy issued by SIF insuring Gem State, which policy remained in full force and effect.

MCCORD'S RELATIONSHIP WITH HOBBS

37. Hobbs accepted the bids submitted by McCord and awarded McCord the framing, demolition, and roof reconstruction on the project. At the time Hobbs informed McCord that his bids were selected, he instructed McCord to provide proof of the existence of McCord's liability and workers' compensation insurance coverage.

38. Hobbs was unaware of the relationship between McCord and Gem State.

39. Hobbs received a copy of the Certificate of Insurance issued to McCord by SIF, and identifying McCord as a certificate holder and Gem State as the insured.

DISCUSSION AND FURTHER FINDINGS

IDAHO PROFESSIONAL EMPLOYER RECOGNITION ACT

40. Both Claimant and Gem State assert that the case at bar involves issues of first impression involving analysis and application of the Idaho Professional Employer Recognition Act (IPERA) which was adopted in 1994 as Idaho Code §§ 44-2401 through 44-2407. The purpose of IPERA was to recognize and provide guidelines for professional employer services.

41. As a condition to being recognized as a professional employer under IPERA, the professional employer must agree to the following minimum standards:

(a) Have a written contract between the client and the professional employer setting forth the responsibilities and duties of each party. The contract shall disclose to the client the services to be rendered, the respective rights and obligations of the parties, and provide that the professional employer:

(i) Reserves a right of direction and control over workers assigned to the client's location. However, the client may retain such sufficient direction and control over the assigned workers as is necessary to conduct the client's business and without which the client would be unable to conduct its business, discharge

any fiduciary responsibility which it may have, or comply with any applicable licensure, regulatory or statutory requirement of the client;

(ii) Assume responsibility for the withholding and remittance of payroll-related taxes and employee benefits from its own accounts, as long as the contract between the client and professional employer remains in force;

(iii) Retain authority to hire, terminate, discipline, and reassign assigned workers. However, the client, if it accepts the responsibility for its action, may have the right to accept or cancel the arrangement of any assigned worker.

(b) Give written notice of the general nature of the relationship between the professional employer and the client to the workers assigned to the client and the public at large. Such notice may be posted in a visible and conspicuous manner at the client's work site.

Idaho Code § 44-2405 (1).

42. IPERA specifically excludes a professional employer arrangement with a “temporary employee,” defined as a worker employed by an organization which hires its own employees and assigns them to a third party to support or supplement the third party’s work force in work situations such as employee absences, temporary skill shortages, seasonal workload conditions, and special assignments and projects. Idaho Code § 44-2403 (5)(d)(i) and (7).

43. Gem State did not have a written contract with McCord beyond the quote for services discussed in preceding paragraph 8. The quote is marginally compliant with the requirement that it set forth the responsibilities and duties of each party. The quote does not address the right of direction and control over workers or the authority to hire, terminate, discipline, or reassign workers.

44. Gem State failed to give written notice of the general nature of its relationship with McCord to McCord’s workers or the public at large. The Certificate of Insurance issued to McCord does nothing to further define the relationship between Gem State and McCord.

45. The job application provided by Gem State to Claimant requires Claimant to acknowledge that he is a temporary employee who will contact Gem State for assignments. Not

only did Gem State fail to notify Claimant of the general nature of its relationship with McCord, it actually required him to sign a job application that was inconsistent with provisions of IPERA in that it designated him as a temporary employee. Clearly, neither Gem State nor Claimant paid the slightest heed to the language in the application, in any event.

46. The Referee finds that IPERA is not applicable on these facts, and the statutory protections of the Act do not extend to Gem State.

CANCELLATION OF SURETY CONTRACT AND ESTOPPEL TO DENY COVERAGE

47. Idaho Code § 72-311 sets out the notice requirements for cancellation of a surety contract. There is no similar statute addressing the issuance or cancellation of certificates of insurance. In the present case, the only surety contract in existence is between SIF and Gem State. The contract of insurance was not cancelled and the provisions of Idaho Code § 72-311 are not applicable.

48. Pursuant to Idaho Code § 72-229 (1):

[A] surety which issues to an employer a policy of workers' compensation insurance and collects a premium based upon moneys paid or to be paid a worker, or a self-insured employer which receives consideration from a worker to cover the cost of workers' compensation coverage, shall not be permitted to plead and raise the defense that the worker, at the time of the occurrence of the industrial accident or manifestation of the occupational disease, was an independent contractor and not an employee of the surety's insured employer or of the self-insured employer.

SIF did not collect premium for workers' compensation coverage for Claimant beyond the pay period ending May 25, 2005. SIF did not collect premium for Claimant during the pay period he was injured (May 26, 2005, through June 8, 2005) and is not estopped from arguing that Claimant was not the employee of Gem State.

OBLIGATION TO PROVIDE COVERAGE

49. Regardless of the application of IPERA, Gem State's only duty to provide workers' compensation coverage to Claimant arose out of the agreement between Gem State and McCord as articulated in the quote for services. The credible evidence establishes that the agreement was verbally terminated by Nick Burggraf on June 7, 2005. Termination of the agreement on June 7, 2005, is consistent with McCord paying his employees in cash on June 10, 2005, rather than submitting his payroll to Gem State.

50. Neither Gem State nor SIF had an obligation to provide workers' compensation insurance to Claimant on the date of his injury.

51. McCord directed the details of Claimant's work and paid him cash for work performed on the date of injury. McCord was Claimant's employer and had the obligation to provide workers' compensation insurance coverage for Claimant on the date of injury pursuant to Idaho Code § 72-301.

STATUTORY EMPLOYER

52. Idaho Code § 72-216 provides, in part:

(1) Liability of employer to employees of contractors and subcontractors. An employer subject to the provisions of this law shall be liable for compensation to an employee of a contractor or subcontractor under him who has not complied with the provisions of section 72-301[Idaho Code] in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.

(2) Liability of contractors and subcontractors. The contractor or subcontractor shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party.

53. McCord failed to secure payment of compensation for Claimant pursuant to Idaho Code § 72-301.

54. There is no “good-faith” exception to Idaho Code § 72-216. Hobbs is the statutory employer in spite of the fact that he believed coverage had been secured by McCord and that the Certificate of Insurance issued to McCord was evidence of such coverage.

COMPENSATION OWED/UNINSURED PENALTY

55. Claimant has established that he is entitled to medical treatment for his left knee injury of June 8, 2005, to include diagnostic arthroscopy.

56. Idaho Code § 72-210 provides for a penalty of 10% of the total compensation awarded as a penalty for failing to carry required coverage along with the award of costs and reasonable attorney fees. Both McCord and Hobbs were uninsured at the time of Claimant’s injury and the penalty applies to both defendants, subject to provisions of Idaho Code § 72-216 prohibiting double recovery by Claimant.

57. Claimant is entitled to the statutory penalty as well as costs and reasonable attorney fees. The total amount of the penalty cannot be calculated at this time, because the amount of future medical care and income benefits, if any, cannot be calculated with specificity.

58. An award of the 10% penalty, costs and reasonable attorney fees, is mandatory upon a finding of an uninsured employer and is made in spite of Claimant’s waiver of attorney fees made in his post-hearing brief.

CONCLUSIONS OF LAW

1. McCord had the obligation to provide workers’ compensation coverage for Claimant at the time of his industrial injury.

2. Hobbs is a statutory employer pursuant to Idaho Code § 72-216.

3. Claimant is entitled to medical treatment for his left knee injury of June 8, 2005, including but not limited to diagnostic arthroscopy.

4. Claimant is entitled to the statutory penalty as well as costs and reasonable attorney fees. The total amount of the penalty cannot be calculated at this time, because the amount of future medical care and income benefits, if any, cannot be calculated with specificity. Both McCord and Hobbs were uninsured at the time of Claimant's injury and the penalty applies to both defendants, subject to provisions of Idaho Code § 72-216 prohibiting double recovery by Claimant.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 10 day of December, 2007.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28 day of December, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DENNIS R PETERSEN
P O BOX 1645
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ALAN HULL
P O BOX 7426
BOISE ID 83707

JOHN O AVERY
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JAMES D HOLMAN
2635 CHANNING WAY
IDAHO FALLS ID 83404

djb

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEVIN P. SMITH,

Claimant,

v.

LANCE MCCORD, dba MCCORD
CONSTRUCTION, Employer,

and

GEM STATE STAFFING, Employer,
and STATE INSURANCE FUND, Surety,

and

LARRY HOBBS, dba HOBBS
CONSTRUCTION, Employer,

Defendants.

IC 2005-007116

2005-008057

2005-008154

ORDER

Filed: December 28, 2007

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. McCord had the obligation to provide workers' compensation coverage for Claimant at the time of his industrial injury.

2. Hobbs is a statutory employer pursuant to Idaho Code § 72-216.
3. Claimant is entitled to medical treatment for his left knee injury of June 8, 2005, including but not limited to diagnostic arthroscopy.
4. Claimant is entitled to the statutory penalty as well as costs and reasonable attorney fees. The total amount of the penalty cannot be calculated at this time, because the amount of future medical care and income benefits, if any, cannot be calculated with specificity.
5. Both McCord and Hobbs are liable for all benefits awarded herein to Claimant, subject to provisions of Idaho Code § 72-216 prohibiting double recovery by Claimant.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 28 day of December, 2007.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/ _____
R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28 day of December, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DENNIS R PETERSEN
PO BOX 1645
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djb

/s/ _____